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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 548

LEON NASH,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statutory Provisions 2

Statement of the Case 3

Reasons for Granting the Writ 13

POINT I—

The holding of the Court of Appeals below is in conflict with the Opinion of the Fourth Circuit in *United States* v. *Virginia Erection Corporation*, 335 F. 2d 868 (4 Cir. 1964). The prejudicial commingling among the alternate and regular jurors violated petitioner's right to a trial by jury under the Sixth Amendment and presents this Court with a unique issue of first impression 13

CONCLUSION—

For the reasons stated, the writ of certiorari should be granted 22

APPENDIX A Memorandum of the United States District Court for the Southern District of New York 23

APPENDIX B Opinion of the United States Court for Appeals for the Second Circuit 26

Table of Authorities

Cases:

PAGE

Chapman v. *California*, 386 U.S. 18 (1967) 19

Gregg v. *United States*, —— U.S. ——, 22 L. Ed. 2d 442 (April 2, 1969) 18

Kaufman v. *United States*, 394 U.S. 217 (3/24/69) .. 22

McCarthy v. *United States*, 394 U.S. 459 (April 2, 1969) 18

Patton v. *United States*, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854 15

People v. *Ryan*, 19 N.Y. 2d 100, 104 (1966) 16, 17, 19

United States v. *Virginia Erection Corporation*, 335 F. 2d 868 (4th Cir. 1964) 13, 14, 15, 16, 17, 19

Statutes and Rules

Federal Rules of Criminal Procedure

Rule 24(c) 2, 3, 4, 5, 15, 19, 20

Securities Act of 1933

Section 5, 15 U.S.C. §77e(a) 3
Section 17, 15 U.S.C. §77q 3

Title 28, United States Code

Section 1254(1) 2

Other Authorities:

United States Constitution

Sixth Amendment 2, 13, 15, 19, 20

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, LEON NASH, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on July 14, 1969.

Opinions Below

The United States District Court for the Southern District of New York denied Petitioner's motion to set aside the verdict against him. This opinion of the District Court has not been officially reported; a copy thereof is appended to this petition as Appendix A. This order of the District Court was affirmed by the United States Court of Appeals

for the Second Circuit on July 14, 1969; a copy of the opinion of the Court of Appeals is annexed hereto as Appendix B, and it has not been officially reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit, which denied petitioner's motion for relief, *inter alia*, pursuant to Title 28, United States Code, Section 2255, was entered on the 14th day of July, 1969.

No application has been made for a rehearing in the United States Court of Appeals.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

Whether defendant Nash ran the risk of having his guilt determined by the three alternate jurors by reason of the fact that the alternates were in a position during meals, in the jury box, and at the hotel to influence the jury in its deliberations, in violation of the Sixth Amendment and Rule 24(c) of the Federal Rules of Criminal Procedure.

Statutory Provisions

Sixth Amendment to the United States Constitution

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

Rule 24(c). of the Federal Rules of Criminal Procedure

"... . Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties . . . An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."

Statement of the Case

An indictment in 48 counts, naming 14 defendants, was filed on March 4, 1965. Petitioner was named in 5 counts which charged him with: (1) conspiring with the other named defendants and co-conspirators to make unregistered sales of the common stock of Allied Entertainment Corporation of America, Inc., and to use the moneys and instruments of interstate commerce in furtherance of a scheme to defraud in the sale of said stock; (2) making unregistered sales of the common stock of Allied in violation of Section 5 of the Securities Act of 1933, Title 15, United States Code, Section 77e(a); and (3) making fraudulent sales of Allied stock in violation of Section 17 of the Securities Act of 1933, Title 15, United States Code, Section 77q.

The trial commenced on April 18, 1966, and on June 25, 1966 the jury returned guilty verdicts on all counts as to petitioner. On February 20, 1967, petitioner was sentenced to imprisonment of a year and a day on each count, the sentences to run concurrently and he was fined $100.00 on each count, for a total fine of $500.00.

Petitioner then appealed and the United States Court of Appeals for the Second Circuit, on July 29, 1968, affirmed the judgment (398 F. 2d 944). Certiorari was denied by the Supreme Court on November 25, 1968 (89 S. Ct. 400).

In petitioner's trial, the District Court refused to discharge the three remaining alternate jurors at the conclusion of the Court's charge. The Court stated that the alternates were to be kept in a separate room, but that they were to be "brought back every time the jury itself comes in, if they ever do, to ask any questions and so on". Defense counsel then directed the Court's attention to Rule 24(c) of the Federal Rules of Criminal Procedure. However, the Court said: "I told you this morning this is what I am going to do and that's that". The Court noted that "what I am doing here is not what Rule 24 requires which is in effect to have the alternates discharged at the time when the jury is sent in to deliberate". Defense counsel then formally objected and the Court granted "exceptions across the board."

In its original opinion affirming the judgment against petitioner, the Court of Appeals singled out for thorough discussion the issue of the District Court's deliberate violation of Rule 24(c) of the Federal Rules of Criminal Procedure, which requires that an alternate juror who does not replace a regular juror "shall be discharged after the jury retires to consider its verdict." In remarking that the Rule imposes a "mandatory requirement," the Court of Appeals defined the issue as whether Nash *"ran the risk* of having his guilt determined by the three alternates in addition to the regular jurors by reason of the fact that the alternates were in a position to influence the jury in its deliberations" (emphasis added). The Court of Appeals

went on to say: "On this record we can make no such findings . . . . Nowhere does it appear that they ate in the same restaurant, rode in the same conveyance, or slept in the same hotel." The Court of Appeals found that, "On the record before us, we cannot find that defendant Nash was prejudiced by the presence of the alternates." The Government's application to file an affidavit to supplement the record in this regard was denied "without prejudice to any facts the Government or Nash may wish to develop in some other proceeding."

Petitioner then moved before the Court of Appeals for a remand to the District Court for a hearing "relating to the opportunity of the alternate jurors to influence the jury in its deliberations . . . ." By an order dated September 6, 1968, the Court of Appeals denied the motion for a remand "without prejudice to such further application the appellant may wish to initiate in an appropriate proceeding in the District Court." By virtue of such September 6, 1968 order of the Court of Appeals, petitioner filed a motion in the District Court on February 4, 1969 to set aside the verdict because of the opportunity of the alternate jurors to influence the regular jurors in their deliberations. On April 1, 1969, after this motion was adjourned several times at the request of the Government, it was referred to Judge Tyler, who held a hearing on April 14, 16 and 23, 1969, which lasted about four hours.

At the hearing, the District Court said that the burden was on the Government, including both the executive and judicial branches, to show that no prejudice occurred to petitioner as a result of the violation of F.R.Cr.P., Rule 24(c).

At this hearing, two alternate jurors and two regular jurors testified, in addition to a co-defendant in the 1966 trial. The Government tried to produce a marshal from each of the three shifts who covered the regular jurors, but it introduced only two such marshals plus a marshal who covered the alternates for one shift and one who handled the transportation of the alternates. The record reveals the following information:

A. *Meal times.*

The record established that the alternate and regular jurors had every opportunity to commingle at breakfast, lunch and dinner during the three days of jury deliberations.

It was definitely established that the alternate and regular jurors ate breakfast, lunch and dinner in the same restaurant at the same time (12-13, 17, 28, 29, 37, 74).* It was also established that the alternates and regulars were physically close to each other while they were in said restaurants. Thus, they ate in Forlini's, a small Italian restaurant, which the foreman of the jury described as "a one-room restaurant" (14) that was "fairly small" (19); an alternate also described it as "a fairly small room" (44) that "wasn't much of a restaurant" (45). When this alternate described a certain meal as compared to a former meal he said: "We weren't as close this time" (50). Even an alternate who was distinctly hostile to defendant remarked that Forlini's was a small restaurant

* Page numbers refer to the stenographer's minutes of the hearing, which are in the record on appeal submitted herewith.

(78). At one meal there was only a distance of four to five feet separating the alternate and regular jurors (51). Breakfast was had in the hotel snack bar, whose furnishings apparently consisted of the usual stool-type arrangement of seats (22, 33, 42, 43, 157). Even one of the marshals used the words "pretty close" to describe the narrow aisle in one of the restaurants (109-110). In fact, at one restaurant, the alternates and regulars were seated at one table (with marshals in between) (37).

Thus, the physical situation was obviously such as to make it quite simple for commingling to occur. In fact, there was testimony by the foreman of the jury that the alternates *did speak* to the regulars as the regulars came into the restaurant where all ate on the first night of deliberations (20). One of the marshals admitted that when the regulars left the small Italian restaurant after lunch, they passed right by the table where the alternates were sitting (128). That there were waves, nods and smiles among the alternates and regulars was established beyond any doubt (24, 29, 46, 73, 81).

B. *Hotel.*

It is acknowledged that the alternate and regular jurors stayed at the same hotel (10). On both nights, the alternates were in the lobby at the same time as the regulars (10-11). On the first night there was apparently some difficulty in straightening out the room arrangements, and there was testimony that "there was talk going on between the alternate and the jurors at that time" (20-21). This was the testimony of the foreman of the jury, and one alternate also verified that the alternates and regulars were in the lobby together (32), contrary to what a marshal said (91).

C. *Jury box.*

The regulars and alternates were together in the jury box during the jury's frequent appearances in Court for further instructions and for the answering of its questions (26-27, 48, 60). In his order of May 2, 1969, Judge Tyler noted the existence of a "barrier" separating the alternate and regular jurors. But in the words of a regular juror, this "might have been a little extra bar, but I am not sure" (159); nevertheless, the alternates and regulars were "pretty close with the chairs" (159-160).

D. *The Marshals.*

In order to meet its burden in this case, the Government tried to introduce testimony from one of the marshals from each of the three shifts who covered the regular jurors, but, in fact, no such marshal who covered the last shift testified (85). Basically, the Government's strategy was to call each of such marshals to the stand and introduce an affidavit (copies of which are in the record on appeal submitted herewith) of each of the marshals in evidence. These affidavits were quite similar, and in such affidavits the marshals said that breakfast was brought to each of the jurors in his hotel room and that the remaining meals were eaten with the alternates and regulars at different tables. In the affidavits, the marshals further allege that the alternates and regulars were kept apart at all times and that there was no contact between them.

However, upon cross-examination of these marshals, it was revealed that the affidavits were prepared for them by the United States Attorney's office, that they were based in substantial part upon assumptions and not per-

sonal knowledge, and that there were serious mistakes in such affidavits.

Thus, Marshal Barefoot had "no doubt" that the regulars and alternates were not in the hotel lobby at the same time (91); he said that he personally checked this out. Of course, this was contrary to the testimony of the regular and alternate jurors (10-11, 20-21, 32). Marshal Barefoot, who was assigned to the alternate jurors, then revealed that he did not even know the regular jurors by sight (91). He admitted making only an "assumption" (96) whether the regulars were or were not in fact there (92). This marshal was obviously testifying what the "practice" is in the marshal's office and not from personal knowledge (91). He admitted making only an "assumption" (96) and further admitted that he could not say that all the regulars had left the lobby by the time the alternates came in (97).

Marshal Caffrey revealed at least one inaccuracy in his affidavit, namely, that the jurors were fed their meals in their hotel rooms (104-105). He acknowledged that the Assistant United States Attorney prepared the affidavit, but he could not account for the aforesaid error (105). He admitted that he did not read the affidavit carefully before signing it (106). Marshal Caffrey further testified that to his knowledge, there was no occasion upon which the regulars and the alternates ate at the same table, as an alternate had previously testified (107). However, he did not even know if the alternates were or were not present when the regulars were having lunch (108).

Marshal Tobin did not even know the contents of the affidavit which was submitted by the Government on his behalf (118) (he apparently was unavailable when the affi-

davit was prepared). He did not know where the alternates were when the regular jury was eating (116, 119, 120). He thus could not say with any certainty that there were no communications between the alternates and regulars, but as he put it in answer to a question about nodding and waving: "I didn't say it didn't happen. I didn't see it." (120). Yet, in his affidavit, Marshal Tobin swore that the regulars and alternates ate at different tables and that the alternates were kept apart from the regulars at all times and that there was no contact between them.

Finally, Mrs. Paccione testified that she was assigned to the *alternate* jurors on the last day of deliberations (122). She swore that her affidavit was correct "in all respects" (123-124). She did admit that the affidavit was prepared by the United States Attorney's office, but she said that she read it carefully and that there was nothing inaccurate in it (132-133). However, in said affidavit, she swore throughout that she was assigned to the *regular* jurors (133).

E. *Mrs. Marx.*

Mrs. Marx was one of the alternate jurors who testified at the hearing. She was distinctly hostile to defendant and volunteered information against his interest whenever possible (60, 65, 66, 71, 72) in spite of her claim of "I don't remember anything" (61). Defense counsel felt compelled to ask her whether she was hostile to defendant or his counsel, and he had to ask the District Court to instruct her to be more responsive (65, 66, 71, 72). When she was asked whether she met any regular juror on the last morning of deliberations, she could not remember

(77). However, when she was asked as to which regular jurors she recognized, the first name she mentioned was Jean Riordan (64). She specifically denied having lunch with Miss Riordan prior to the jury's deliberations; she said "Of course not" (77). This was contrary to other testimony at the hearing, as was her assertion that the alternates and regulars never ate at the same table (82). The foreman of the jury revealed that Mrs. Marx had said in words or substance during the trial that "They are all guilty these over-the-counter guys" (14-16). Of course Mrs. Marx denied making such a statement (82), but after her denial, she betrayed an unusual curiosity in that she asked the Judge whether she could ask defense counsel "who said I said it" because she was "just curious to ask who is quoting me" (83). Mrs. Marx was involved in a highly unusual telephone call (described below) to a regular juror (Miss Jean Riordan), which led to the latter's involvement in this hearing.

F. *Jean Riordan.*

On Saturday April 12, or Sunday April 13, 1969, Mrs. Marx called one Jean Riordan, who was a regular juror. On Sunday evening, April 13, Miss Riordan called the Assistant United States Attorney in charge of the case and told him that Mrs. Marx had called her; Miss Riordan revealed that she had had lunch with Mrs. Marx. This incident was not revealed to defense counsel until Wednesday, April 16, 1969, in spite of the fact that Mrs. Marx had testified on April 14, 1969. The Court decided to call Miss Riordan as a Court witness; Judge Tyler revealed that someone acting on behalf of Nash had been trying "to interrogate her on many occasions in recent weeks" (143). Judge Tyler later corrected himself and admitted that no

one acting on behalf of Mr. Nash had been trying to contact her (148-149). Miss Riordan did testify that she and Mrs. Marx had lunch on "many days" prior to deliberations (149), contrary to what Mrs. Marx testified. She was quite clear that she had no lunch with Mrs. Marx during deliberations (150). Although Mrs. Marx had testified on a previous day when defense counsel knew nothing of Miss Riordan's telephone call, the District Court refused to allow defense counsel to ascertain what Mrs. Marx told Miss Riordan when she telephoned the latter (168-169).

G. *Mrs. Allen.*

One of the alternate jurors, a Mrs. Allen, was subpoenaed, but she refused to testify, claiming that she was going on vacation (85-86). The District Court refused defense counsel's request for an opportunity to question Mrs. Allen (113). Later, after Miss Riordan had testified as a Court witness, the District Court, in effect, said that Miss Riordan would have to suffice in the place of Mrs. Allen (171-175). The Court asked: ". . . so what are we to do, just go on and on and hope some witness we can bring in here on a court subpoena, a party subpoena, is going to blurt out something that changes the picture?" (175). To this, defense counsel responded: "That may well be the case, your Honor" (175).

H. *Conversations prior to deliberations.*

It was established that the alternate and regular jurors discussed the case among themselves prior to deliberations (16). When defense counsel sought to corroborate this by asking an alternate whether such conversations, including discussions on the credibility of witnesses or their testi-

mony, had taken place, the District Court refused to permit an answer because of an alleged "fishing expedition" (51-52, 54-55, 153).

REASONS FOR GRANTING THE WRIT

POINT I

The holding of the Court of Appeals below is in conflict with the opinion of the Fourth Circuit in *United States* v. *Virginia Erection Corporation*, 335 F. 2d 868 (4 Cir. 1964). The prejudicial commingling among the alternate and regular jurors violated petitioner's right to a trial by jury under the Sixth Amendment and presents this Court with a unique issue of first impression.

A. *Abundant Opportunities for Prejudicial Commingling Existed.*

The Court of Appeals has itself defined the issue to be decided here, namely, whether Nash "ran the risk of having his guilt determined by the three alternates in addition to the regular jurors by reason of the fact that the alternates were in a position to influence the jury in its deliberations" (398 F.2d 944, 950). The record now clearly reveals Nash *did* run such risk.

Thus, the alternates and regulars stayed at the same hotel during the three days and two nights of deliberations (10). They were in the hotel lobby together, and talking may have occurred among them (10-11, 20-21, 32); this was amid confusion resulting from a snag in room arrangements (20-21).

The alternates and regulars ate breakfast, lunch, and dinner in the same restaurants at the same time, often only a few feet from one another. On one occasion, they ate at the same table (37). They probably passed right by one another when they were at separate tables (128, 109-110). At the least, there was nodding, smiling, and waving among them (24, 29, 46, 73, 81). Indeed, one restaurant was so small that one alternate did not even consider it "much of a restaurant" (45).

The alternates were present in the jury box with the jury during its frequent appearances in Court for further instructions and for the answering of its questions (26-27, 48, 60). The alleged "barrier" in the jury box "might have been a little extra bar" (159) but the alternates and regulars were "pretty close with the chairs" (159-160).

The law is settled that there thus existed sufficient opportunities for prejudice to warrant a reversal of Nash's conviction. The principal case (which was cited by the Court of Appeals in its opinion, 398 F.2d 944, 950) is *United States v. Virginia Erection Corporation*, 335 F.2d 868 (4th Cir. 1964). As the Fourth Circuit said:

> "Rule 24(c) is explicit in defining the function of an alternate juror and the time when his replacement of a disqualified regular juror begins, that is, *prior* to the time the jury retires to consider its verdict. It further provides that an alternate juror who does not so replace a regular juror *shall be discharged* after the jury retires to consider its verdict." (Emphasis in original.)

As the Fourth Circuit further noted, it is certain that the alternate has no legal standing as a juror, and that

Rule 24(c) requires that he be discharged. Accordingly, the alternates should not have been permitted to remain with the jury during a three-day period of deliberations, during which they were in a position by word or expression to influence the jury.

The fact that Rule 24(c) was violated should of itself constitute reversible error, especially since the trial court specifically acknowledged, in response to clear defense objections, that it was knowingly violating Rule 24(c). The dangers inherent in such commingling mandate reversal. Such dangers were noted by the Court of Appeals in its opinion, as follows (398 F.2d 944, 950):

> "The prejudice flows from the fact that a defendant runs the risk of being tried by more than the twelve jurors guaranteed to him by the Constitution and the Rule, or of being placed in double jeopardy by being tried by more than one jury (*Patton* v. *United States*, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854).
>
> "The absence of benefit being so clear and the danger of prejudice so great, it seems foolhardy to depart from the command of Rule 24."

In *United States* v. *Virginia Erection, supra,* the violation of Rule 24(c) was held to require a new trial although counsel for both the Government and the defendant had consented to such violation. That Court deemed it "most unwise to place the judicial stamp of approval upon this attempt of court and counsel to circumvent the established rule and to substitute unauthorized procedures." The Fourth Circuit explicitly noted that Rule 24(c) preserves the Constitutional (Sixth Amendment) jury of twelve to which a defendant is entitled. A proposal that substitution

of an alternate for a regular juror be permitted after the case is submitted was rejected after the Supreme Court questioned the desirability and constitutionality of such a procedure. See *United States* v. *Virginia Erection, supra,* at 871; see also *People* v. *Ryan,* 19 N.Y.2d 100, 104 (1966).

The Government's argument in *United States* v. *Virginia Erection* was the same as that in the present case, namely, that the defendants were not prejudiced by the violation. In firmly rejecting this argument, the Fourth Circuit noted:

> "Whether, in fact, alternate Sublett obeyed the instructions of the court is not revealed by the record. It is, of course, possible that he could have remained silent during the deliberations. However, if he heeded the letter of the court's instructions and remained *orally* mute throughout, it is entirely possible that his attitude, conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors. [Emphasis in original] . . . It is possible that Sublett's presence may have operated to some extent as a restraint upon the jurors and their freedom of action and expression."

In *People* v. *Ryan, supra,* the New York Court of Appeals noted:

> "In *People* v. *Bruneman* (4 Cal. App. 2d 75 [Calif. Dist. Ct. of App.]), the trial court, *with the consent of the defendant's counsel,* permitted the alternate jurors to sit in on the jury's deliberations. The two alternates had been instructed that they were not to take part in any of the discussion but were merely to listen. The District Court of Appeal of California, in

an opinion later expressly adopted by the Supreme Court of California (*People* v. *Britton*, 4 Cal. 2d 622), held that the defendant's right to a trial by a jury of 12 was violated and reversed the conviction. 'If in the case at bar it be suggested that there were only twelve jurors who returned a verdict, it must be answered that to an extent which cannot be seen or measured, the process of agreement upon such verdict may have been, and probably was, influenced by the presence of fourteen persons,—the twelve jurors plus the two outsiders' (*People* v. *Bruneman, supra*, p. 81)."

The sole fact that in *Nash* the alternates were not together with the regulars in the jury room during deliberations does not make any difference. The facts show abundant opportunity for commingling, and the presence of the alternates in such circumstances probably influenced "the process of agreement upon such verdict" "to an extent which cannot be seen or measured." *People* v. *Ryan, supra.* An alternate's "attitude, conveyed by facial expressions, gestures or the like," "may have had some effect upon the decision of one or more jurors." *United States* v. *Virginia Erection, supra.* These influences upon the regular jurors can obviously be felt inside *or* outside the jury room; the important fact is that they all (alternates and regulars) were together on numerous occasions during the period of deliberations when such influences *may* have been felt. The Fourth Circuit used the word "may"; it did not require proof of an *actual* effect, obviously knowing that such effect might not be seen or measured. Defendant and his counsel were not present during the three-day period of deliberations; they had no camera and tape recorder to make a record.

This Court has recently granted certiorari in cases involving violations of the Federal Rules of Criminal Procedure, and in one of such cases, the conviction was set aside. *McCarthy* v. *United States,* 394 U.S. 459 (April 2, 1969), dealing with Rule 11; also see *Gregg* v. *United States,* —— U. S. ——, 22 L. Ed. 2d 442 (April 2, 1969).

One of the alternates had said, prior to deliberations, and in the hearing of the regulars that "They are all guilty, these over-the-counter guys" (20-21); this alternate testified at the hearing, was clearly hostile to defendant (65, 66, 71, 72) and tried to protect herself in every possible way. This alternate telephoned one of the regular jurors shortly before the hearing, and she testified that she had never had lunch with this regular juror prior to deliberations (77), although the regular juror later testified they had lunch on "many days" prior to deliberations (149). Further, there was evidence that, prior to deliberations, the alternates and regulars discussed this case, probably including the credibility of witnesses, among themselves (16). In light of all these facts, how can a court say that the presence of the alternates did *not* have some effect or restraint upon one or more jurors?

Counsel for Nash was overruled by Judge Tyler when the former asked an alternate juror about discussions of the case, including the credibility of witnesses or their testimony, among the alternate and regular jurors prior to deliberations (51-52, 54-55, 153), although such was already in evidence (16). The following then occurred (56-57):

> "Mr. Londin: I have no further questions.
>
> "May I just be heard for a moment on the subject of the objection your Honor sustained? I just wanted

to point out briefly, your Honor, that if there were such discussions between alternates and regulars, or if the regulars heard any of the alternates so address themselves, then their subsequently being thrown together and seeing one another might tend to reenforce the prior expression of views or cause the jurors, for example, the regular jurors, to recall, for example, that an alternate may so have expressed himself.

"THE COURT: With a salute to your ingenuity, I adhere to my ruling."

Upon the teaching of *People* v. *Ryan* and *United States* v. *Virginia Erection,* it is submitted that Judge Tyler erred in so ruling. These discussions occurred and require a new trial. By its ruling the District Court prevented a non-juror, *i.e.,* an alternate, from adding his testimony to that of a regular juror in setting forth these forbidden discussions, which alone mandate reversal, and which compound the Rule 24 error.

B. *The Government Failed to Meet Its Burden.*

As the District Court acknowledged, the Government has the burden (135-136, 174) of showing beyond a reasonable doubt that no prejudice resulted to Nash from the Sixth Amendment and Rule 24(c) violation. This is in accordance with *Chapman* v. *California,* 386 U.S. 18 (1967), where this Court held that "the beneficiary of a constitutional error (must) prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

This burden was in reality erroneously transferred to defendant Nash. In his order of May 2, 1969, Judge Tyler said Nash's motion to set aside the verdict was based upon

the existence of actual prejudicial communications. This is incorrect. Nash moved on the ground of the *opportunity* of the alternates to influence the regulars, in accordance with the opinion of this Court. Obviously, Judge Tyler was requiring defendant to demonstrate actual prejudicial communications, contrary to what all the other courts confronted with this problem have said. By affirming Judge Tyler's order, the Court of Appeals has created a clear conflict among the circuits. Can this Court realistically expect the marshals and jurors who testified to admit that they violated their oaths, when their jobs and reputations, to say the least, would be at stake? Judge Tyler thus placed an impossible burden on petitioner.

The Government attempted to meet its acknowledged burden by calling one marshal from each shift (85). It introduced affidavits (see Appendix) from the marshals in which they swore that the alternates and regulars were kept apart at all times. These affidavits were, however, shattered upon cross-examination. The United States Attorney's office prepared such affidavits (105, 118, 132), which were admittedly based upon assumptions and not personal knowledge (91-92, 96, 106, 108, 116, 119, 120, 132-133). Errors were admittedly made in these affidavits (such as swearing—incorrectly—that the jurors had breakfast in their hotel rooms) (104-105, 132-133). The marshals were admittedly not observing the jurors at all times and those assigned to one group (*e.g.*, alternates) did not even know who the other group (*e.g.*, regulars) were and where they might happen to be at the time (91-92, 96-97, 108, 116, 119, 120). The marshals were testifying as to their usual "practice" (91), but it is not the usual practice of the District Court to retain the alternates in violation of Rule 24(c) and the Sixth Amendment. In fact, one marshal swore in

her affidavit that she was assigned to the *regular* jurors; she testified that she read her affidavit carefully before signing it and that there was nothing inaccurate in it (122-124, 132). This marshal further testified that she read her affidavit again before she testified at the hearing (133). However, she testified, before and after attesting to the accuracy of her affidavit, that she was assigned to the *alternate* jurors (122-124). Thus, the period covered by this marshal, the last day of deliberations, was left *completely uncovered* by the Government with regard to testimony showing a lack of prejudice. The Government's strategy was to call one marshal from each shift who covered the *regular* jurors (85). However, since the last marshal who testified revealed that she was assigned to the alternates and not the regulars, the Government thus offered no testimony as to (i) coverage of the regulars during the last day of deliberations or (ii) coverage of the alternates for the first two days of deliberations (excluding the marshal who only transported the alternates to and from the hotel). How, then, could the District Court possibly find that the Government met its burden?

C. *Commingling Prior to Deliberations.*

Evidence was introduced which showed that the alternates and regulars talked about this case among themselves prior to deliberations (16). Such conversations are contrary to law and of themselves constitute grounds for reversal. They also show that the alternates' views may have influenced the views of the regulars and thus made the continued presence of the alternates all the more prejudicial (56). Defense counsel was prepared to corroborate such evidence through an alternate juror, but the Government's objection was sustained (51-53). Judge Tyler in-

correctly said that this "really hasn't even been raised here" (52) and called it "a fishing expedition" (52). He would not entertain a second motion directed at the subject (52). However, as this Court reiterated in *Kaufman* v. *United States*, 394 U.S. 217 (3/24/69):

> " . . . conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary judicial review."

CONCLUSION

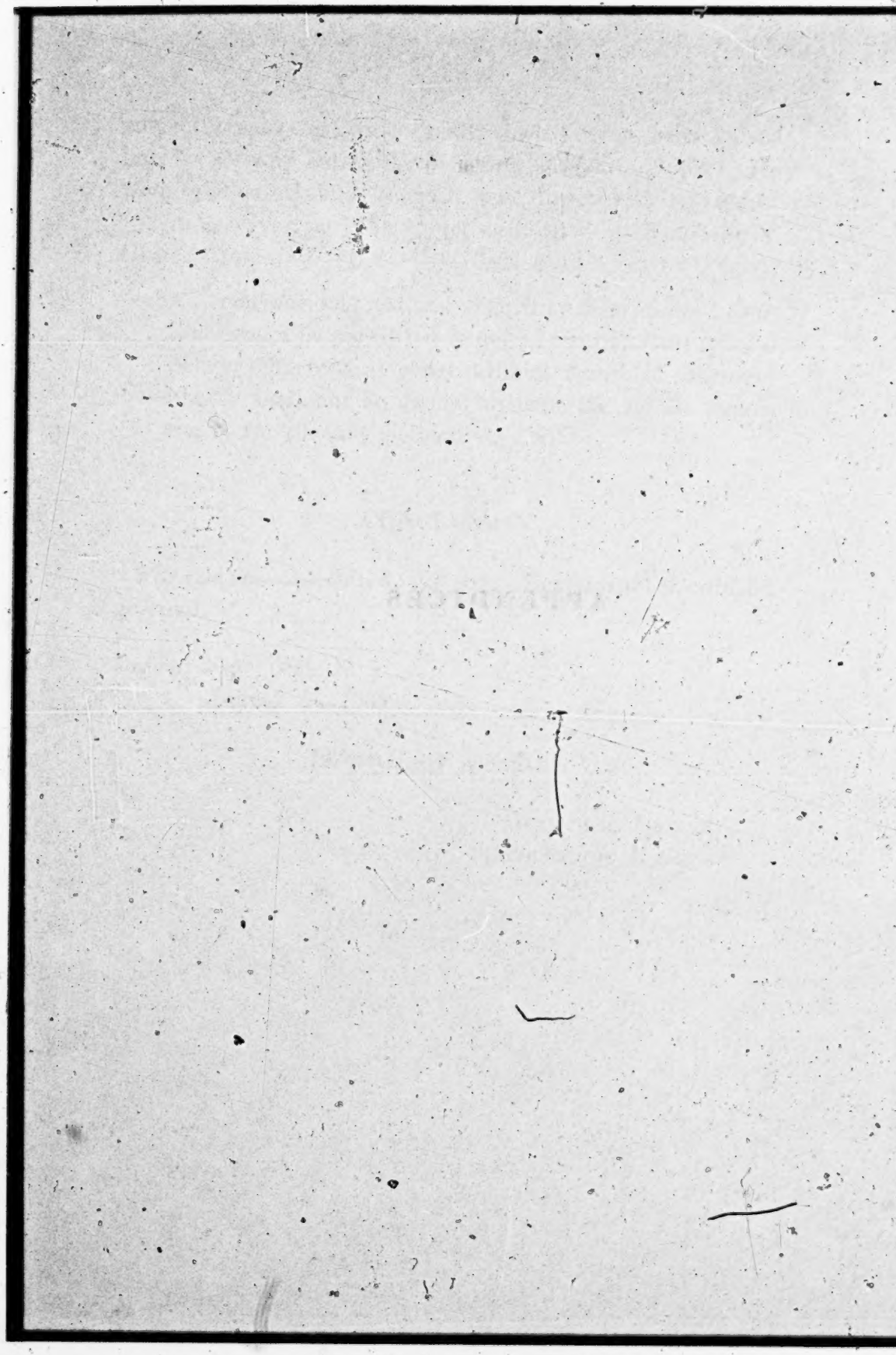
For the reasons stated, the writ of certiorari should be granted.

Dated: New York, N. Y.
August 26, 1969

Respectfully submitted,

JEROME J. LONDIN
Counsel for Petitioner

APPENDICES



APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—against—

LEON NASH,

Defendant.

MEMORANDUM—65 Cr. 198

TYLER, *D.J.*

On April 14, 16 and 23, 1969, an evidentiary hearing was conducted in respect to the application of defendant Nash to set aside the verdict against him in this case upon the general ground that he was deprived of a fair trial in that there were prejudicial communications between members of the regular jury and retained alternates during the jury deliberations. 28 U.S.C. §§1651(a) and 2255; Rule 33, F.R.Cr.P. The hearing having been concluded and the court having considered the evidence and the submissions of law by the parties, the following findings of fact and conclusions of law are hereby entered.

FINDINGS OF FACT

1. There is no credible evidence that during the three days of the jury deliberations any communications or con-

versations took place between the regular jury and the alternates, save for possibly an occasional distant wave or common salutation of greeting as the regular jurors and the alternate jurors went their separate ways in the restaurants at which they had their meals.

2. The directions of the court for segregation of the regular jurors and retained alternates during deliberations were maintained by the marshals throughout the deliberations in the court house and outside thereof at such places as restaurants and in the hotel where the jurors were sequested during the nights.

3. There is not a scintilla of evidence that the defendant Leon Nash was prejudiced by anything which occurred or failed to occur during the deliberations of the jury.

4. Although it is true that the jurors and alternates sat along the same wall (although with a barrier between them) in the court room on those occasions when the jury came in for instructions or the reading of evidence during the deliberations, there is no evidence that the alternates communicated or conversed with the regular jurors during these intervals.

5. There is affirmative testimony from the marshals and certain jurors that no communications passed between the regulars and the alternates. I find those witnesses credible and their testimony believable.

Conclusions of Law

A. Defendant Nash has neither substantially alleged nor proved any competent fact which, if believed, would entitle him to the relief sought.

B. There is absolutely no credible basis for concluding that there was commingling between the regular and alternate jurors, nor is there any evidence that the regular jurors and alternates improperly communicated with one another during deliberations.

C. Defendant Nash has failed to show any prejudice to himself by reason of the procedures followed by the court and the jury during deliberations in this case.

D. The showing that alternates and regulars were scrupulously segregated throughout the period of the jury's deliberations provides a substantial basis for concluding that no commingling or communication occurred between the regular jurors and alternates.

Accordingly, the motion to set aside the verdict against defendant Leon Nash is denied as being totally devoid of merit. Defendant Nash is directed to surrender in Room 318 of this court house at 10:30 a.m. on May 8, 1969. It is so ordered.

May 2, 1969.

H. R. TYLER, JR.
U.S.D.J.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 701—September Term, 1968.

(Argued June 13, 1969 Decided July 14, 1969.)

Docket No. 33589

UNITED STATES OF AMERICA,

Appellee,

—against—

LEON NASH,

Appellant.

Before:

MOORE, SMITH and ANDERSON,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* denying appellant's motion to set aside a jury verdict on the ground that the alternate jurors had not been discharged in accordance with Rule 24(c) of the Federal Rules of Criminal Procedure.

Affirmed.

JEROME J. LONDIN, New York, N. Y. (Carro, Spanbock & Londin, New York, N. Y., and Allen Green, of counsel), *for Appellant.*

FRANK M. TUERKHEIMER, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., and Charles P. Sifton, Assistant United States Attorney, of counsel), *for Appellee.*

MOORE, *Circuit Judge*:

Leon Nash appeals from an order of the United States District Court denying his motion to set aside a verdict against him which resulted in his conviction on five counts of an indictment charging him with conspiracy to sell unregistered stock and with the sale of stock by fraud. He was sentenced to concurrent terms of one year and one day and fined $500. His conviction was affirmed by this Court. 398 F. 2d 944 (2d Cir. 1968).

Thereafter, Nash moved to set aside the verdict on the ground that the alternate jurors had not been discharged in accordance with Rule 24(c) of the Federal Rules of Criminal Procedure. A hearing on his motion was held and his motion denied.

Nash claims that he was denied a fair trial because, as he alleges, there were communications between members of the regular jury and retained alternates during the jury deliberations. The court below, after three days of hearings, found:

> "1. There is no credible evidence that during the three days of the jury deliberations any communications or conversations took place between the regular jury and the alternates, save for possibly an occasional distant wave or common saluation of greeting as the regular

jurors and the alternate jurors went their respective ways in the restaurants at which they had their meals.

"2. The directions of the court for segregation of the regular jurors and retained alternates during deliberations were maintained by the marshals throughout the deliberations in the court house and outside thereof at such places as restaurants and in the hotel where the jurors were sequested [sic] during the nights.

"3. There is not a scintilla of evidence that the defendant Leon Nash was prejudiced by anything which occurred or failed to occur during the deliberations of the jury."

The record amply supports the District Court's findings. However, Nash argues that, even accepting the court's findings, he "ran the risk of having his guilt determined by the three alternates in addition to the regular jurors" because the trial judge at his criminal trial did not dismiss the alternates after the regular jurors retired to consider the verdict. In short, he contends that he was prejudiced *per se* by the failure to discharge the alternates. Yet, this court in affirming his conviction rejected this very contention. 398 F. 2d at 950, 951. The risk this court was referring to, *id.* at 950, was the risk of impermissible contact. The record is barren of any prejudicial contact. Nash cannot be found to have run the risk of having his guilt determined by anyone other than the twelve regular jurors.

United States v. *Virginia Erection Corp.*, 335 F. 2d 863 (4th Cir. 1964), cited by appellant, is inapposite. In that case an alternate juror spent the entire period during jury deliberations in the jury room with the twelve regular jurors and was, therefore, in a position to influence discus-

sion and deliberation. Such contact, in fact any significant contact, is absent here.

Finally, Nash challenges three discretionary rulings by the District Court (1) limiting the hearing to the possible contact between alternates and regulars during deliberations and prohibiting inquiry into such contacts *prior* to deliberations, (2) preventing Nash's lawyer from inquiring into the substance of a telephone call between one of the alternates and a regular juror *prior to the hearing,* and (3) ending the hearing before the third alternate could be called. The record indicates that the scope of inquiry was properly restricted by the court below which sought to prevent unnecessary fishing expeditions by appellant's lawyer and improper efforts to undermine the jury's verdict. Since the claimed prejudice was the alleged impairment of the jury's deliberations, rulings (1) and (2) were clearly correct. The challenged telephone conversation between a regular juror and an alternate occurred after the trial had ended but before the hearing below. The claim that the hearing was prematurely terminated is without substance. The fact is that no offer of proof was made as to what the testimony of the third alternate would have been and the judge was well within his discretion in concluding that her testimony would have been cumulative. Significantly, after the examination of the last witness was concluded, Nash's lawyer, after conferring with his client, informed the court he had no further witnesses. It was only after the judge reminded him about the third alternate that he stated he wished to call her. The statement that Nash's counsel had no other witnesses and the absence of any offer of proof as to the significance of that testimony completely rebut the contention that the court below exceeded its discretion in terminating the hearing when it did.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 548

LEON NASH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. In 1966, following a nine-week jury trial in the United States District Court for the Southern District of New York, petitioner, tried together with six other defendants, was convicted on five counts of a multi-count indictment which charged him with conspiring to make and making fraudulent sales of unregistered common stock, in violation of 15 U.S.C. 77. On February 20, 1967, he was sentenced to concurrent terms of one year and one day's imprisonment on each count and fined a total of $500.

In submitting the case to the jury, the trial court declined to discharge the three alternate jurors. The regular jurors deliberated at length (three days) before returning their verdicts. None of the alternates were called upon to substitute for a regular juror and none participated in the deliberative sessions in the jury room. On direct appeal petitioner asserted that the retention of the alternates was contrary to Fed. R. Crim. P. 24(c), which requires the discharge of alternates when the case is submitted to the regular jurors. The court of appeals agreed but held that, in view of the record before it, the error appeared harmless. It noted, however, that a further proceeding by petitioner in the district court would not be inappropriate. *United States* v. *Hayutin*, 398 F. 2d 944, 950-951 (C.A. 2).[1] This Court denied a petition for a writ of certiorari 393 U.S. 961.

In February 1969, petitioner moved the district court to set aside the verdict "because of the opportunity of the alternate jurors to influence the regular jurors in their deliberations" (Pet. 5). The matter was referred to Judge Tyler, the trial judge, and in April 1969, a three-day evidentiary hearing was held. After hearing nine witnesses, Judge Tyler entered findings of fact, concluding that there "is not a scintilla of evidence that the defendant Leon Nash was prejudiced by anything which occurred or failed to occur during the deliberations of the jury" (Pet.

[1] Others convicted with petitioner had their appeals considered in *United States* v. *Billotti*, 380 F. 2d 649 (C.A. 2), certiorari denied, 389 U.S. 944.

App. A 24). He denied the motion as "totally devoid of merit" (Pet. App. A 25). The court of appeals affirmed, finding that the "record amply supports the District Court's findings." (Pet. App. A 28, 26-29).

2. We note at the outset that the situation here is unlikely to recur, since the court of appeals made quite clear its opinion on direct appeal that district courts must adhere strictly to the discharge requirements of Fed. R. Crim. P. 24(c). 398 F.2d at 950. The question is thus basically a factual one—whether, despite the fact that the alternates were not in the jury room during its deliberations, their opportunities to commingle with the regular jurors at other locations after the case was submitted to the jury "probably influenced" the verdict. Petitioner's principal evidence to support his claim was that of the jury foreman,[2] who testified that he saw the alternates commingle with the other jurors at their common hotel lobby and at one of the restaurants where the jurors ate, and heard them speak together (R. 10-11, 20).[3] The government relied on the testimony of four of the jurors, two of the alternate jurors, and one regular juror. Each of them, contradicting the foreman's testimony, agreed that there had been no communication between the regular and alternate jurors dur-

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[2] The foreman had sought to aid counsel for other defendants in their efforts to impeach the verdicts in 1966 (R. 52). A co-defendant, Harris, also testified for petitioner as to what fraternization between the jurors he thought he saw (R. 5-8). Petitioner's counsel stated he was not "overly impressed" by Harris' testimony (R. 112).

[3] "R." refers to the one volume transcript of the evidentiary hearing on file with the Clerk of this Court.

ing the period of deliberations—that, at most, individuals may have exchanged a smile or nod of greeting as the two groups, on occasion, converged (R. 32-50, 59-68, 99, 103, 117-119, 127-134, 151-164). Any discrepancies between the testimony of the marshals and their prior affidavits, so heavily relied upon by petitioner (Pet. 8-10, 20-21), were for the trier of fact to resolve; there was no abuse of discretion in resolving them against petitioner.

The evidence Judge Tyler credited showed that once deliberations began, the alternates always remained apart from the regular jurors in court except when the two groups were recalled to have testimony re-read or to receive further instructions (R. 59-60); at such times, a panel separated the alternates from the regulars and they had no opportunity to speak (R. 69). Petitioner describes one alternate juror, Mrs. Marx, as hostile (Pet. 10-11, 18; see 21). Yet the foreman did not say he saw or heard Mrs. Marx speak to the regular jurors during deliberations. Moreover, in her testimony at the hearing, Mrs. Marx denied any feeling of hostility or that she communicated with a regular juror during the days of jury deliberation (R. 66-68). Miss Riordan, a regular juror, corroborated Mrs. Marx, stating that she had never heard Mrs. Marx express any views of the case before the deliberations were held (R. 151, 153), and certainly not during the deliberations (R. 153). Miss Riordan testified that the two groups had always been separated and that when they did meet they were "too far away to speak" (R. 155, 162, 164-166; see also 29, 46, 49, 59, 62, 91, 102,

121, 125). In short, as the court of appeals held, the district court could properly conclude that the record was "barren of any prejudicial contact" (Pet. App. A. 28-29).[4]

3. Petitioner's other contentions relate to highly particular aspects of the hearing; as to them, we rely on the thorough opinion of the court below.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1969.

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[4] *United States* v. *Virginia Erection Corp.*, 335 F. 2d 868 (C.A. 4), upon which petitioner relies, is inapposite. In that case, wholly unlike the situation here, the alternate juror spent the entire period of deliberations in the jury room with the regular jurors.

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CERTIORARI DENIED